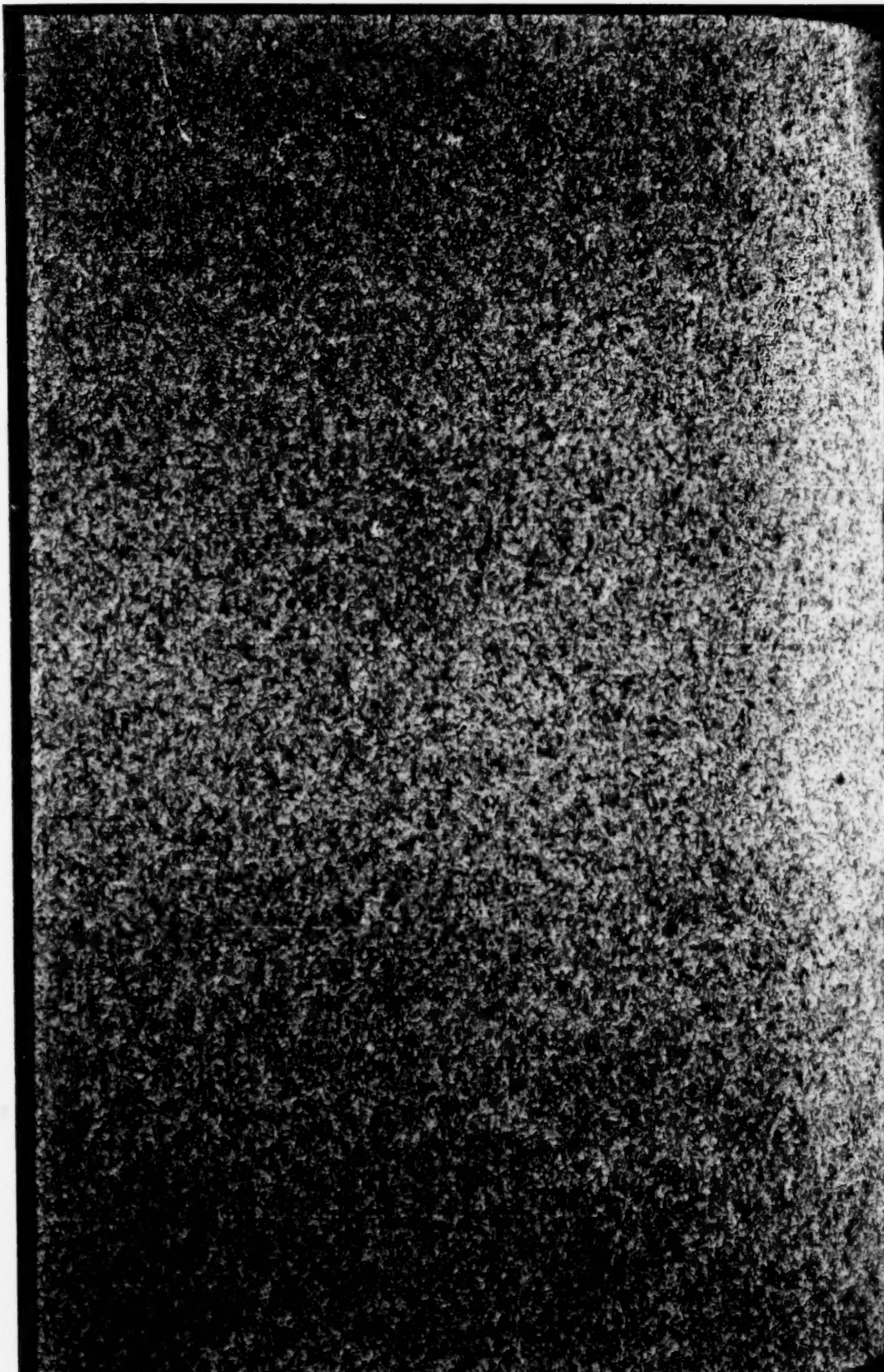

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1934.

No. 434.

J. CONGDON SEABURY, As Receiver of the City National Bank of Sumter, South Carolina, *Petitioner,*

vs.

BEATRICE C. GREEN, Administratrix D. B. N., C. T. A., of the Estate of Moses Green, Deceased, et al., *Respondents.*

BRIEF OF PETITIONER.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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I. The contingent assessment liability of Moses Green upon the four shares of stock in question survived his death and became a liability and charge or lien upon his estate. The State Supreme Court, having held that the attempted transfer of title of said stock to the defendants, Helen, Herbert, and Allen Green, minors, by Leon M. Green as executor of the estate of Moses Green, was void and ineffectual to transfer title, it follows that ownership and title of the stock never passed from the estate of Moses Green and that the estate continued liable. Such contingent liability ripened into absolute liability when the assessment was levied on or about August 26, 1932, notwithstanding the state probate court had entered an order a considerable period prior to such levy authorizing, and Leon M. Green as executor had made, distribution of the entire assets of the estate. The receiver was entitled to enforce collection of the assessment from the assets of the estate of Moses Green and could properly pursue such assets into the hands of all of the defendants holding the same, including said minors as distributees and legatees	16

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(A) The decision of the State Supreme Court that the attempted transfer of the four shares of stock to the minors was void, and ineffectual to transfer title, necessarily requires the conclusion, in consequence thereof, that title to such stock never passed from Moses Green and that his estate remained responsible for such liability as the law attached thereto incident to such ownership.. 16

(B) The contingent assessment liability of Moses Green upon the four shares of stock survived his death, became a liability and charge or lien upon his estate, became an absolute liability upon the levy of the assessment, and can be enforced by the receiver against the assets in the hands of the distributees and legatees (including the assets received by the minor defendants), notwithstanding the assets had been distributed and the estate closed a considerable period prior to the levy of the assessment 19

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(C) The laws of South Carolina make the debts and obligations of a decedent a charge or lien upon the assets of his estate, and in consequence permit the creditor to pursue the assets into the hands of the heirs, distributees and legatees 21

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(D) The Federal statutes create the assessment liability and make the same a charge or lien upon the assets of the estate of a decedent. Hence, regardless of state laws, such lien follows the assets into the hands of the distributees and legatees, and accordingly the court below was in error in holding that the assets of the estate of Moses Green were not traceable to the defendants as distributees and legatees of said estate 26

II. In the alternative, and in the event this court should consider and find that the State Supreme Court had committed error in that it should have held that the transfer of stock to the minor defendants should properly be treated as an effective transfer with the title constructively held by the guardian of said minors on behalf of said minors, the State Supreme Court further erred in not holding that the assets of the guardianship estate of said minors were liable under Section 66, Ch. 2, Title 12, U. S. C., for the amount of the assessment to the extent of the assets received from the estate of Moses Green. This Court may, if it sees fit, review the whole case and consider the present contention 30

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vs.

BEATRICE C. GREEN, Administratrix D. B. N., C. T. A., of the Estate of Moses Green, Deceased, et al., *Respondents.*

BRIEF OF PETITIONER.

A.

OPINIONS BELOW.

The decision and opinion of the Supreme Court of South Carolina is reported in 175 S. E. 639, and appears in the record, pages 25-31. The decision and opinion of the Court of Common Pleas of Sumter County, South Carolina, is not reported, but appears in the record, pages 12-21.

B.

JURISDICTION.

The decision of the Supreme Court of South Carolina was filed of record June 26, 1934 (R. p. 25). Petition for rehearing was seasonably filed under the State practice, and was denied August 13, 1934 (R. p. 32). Petition for writ of certiorari was in due course filed, and an order by this Court granting the writ was filed November 5, 1934 (R. p. 39).

The writ of certiorari was applied for under section 237(b) of the Judicial Code (U. S. Code, Title 28, ch. 9, sec. 344(b)), providing for the granting of a writ of certiorari by this court to review a final judgment or decree of the highest court of a state in a suit:

> "where any *title, right, privilege,* or immunity, is specially set up or claimed by either party under the Constitution, or any treaty or *statute of* * * * the United States; and the power to review under this paragraph may be exercised as well where the said claim is sustained as where it is denied * * *." (Italics inserted)

Discussion of the question of jurisdiction, under the statute, will be found under the caption "The Federal Question" immediately following the "Statement of the Case", *infra,* page 6.

C.

STATEMENT OF THE CASE.

Petitioner, as receiver of the City National Bank of Sumter, South Carolina, filed a suit May 18, 1933, in the Court of Common Pleas of Sumter County, South Carolina, against the defendants hereinafter named, to enforce the collection of a stock assessment, levied by the Comptroller of the Currency, upon four shares of stock of said bank of the aggregate par value of $400, which were registered

upon the books of the bank in the name of one Moses Green at the time of his death March 17, 1927 (R. pp. 2-6). Moses Green left a will making certain specific bequests and devises and providing in the residuary clause thereof that the balance of his estate, real, personal, or mixed, be equally divided into five parts, one-fifth to his grandchildren, defendants Helen, Herbert and Allen Green, and one-fifth to each of his four surviving children, defendants Leon M. Green, Alvah I. Green, Ethel Green Blatt, and Aaron Green. Leon M. Green was appointed executor. (R. pp. 9-11)

Due administration was had upon said estate, the assets were distributed, the estate was closed, and the executor, Leon M. Green, was discharged. At the time of such discharge the bank was a going concern, no assessment had been levied, and no demand had been made upon said executor for the payment of any stock assessment liability (R. pp. 5, 15). The exact date of closing of the estate is not shown, but it appears to have been several years prior to the closing of the bank. (R. p. 5)

Included among the assets so distributed were twenty shares of stock of said bank. Each of the four adult defendants received four shares of said stock, and the same were transferred upon the books in their names, and said defendants have paid their assessments upon said stock (R. pp. 16, 20). The remaining four shares were transferred by the executor to, and registered upon the books of the bank in the names of said grandchildren, defendants Helen, Herbert, and Allen Green, who were at that time, and at the time of the filing of said suit, minors (R. pp. 14, 15).

Said City National Bank closed on or about July 21, 1932, petitioner was duly appointed receiver of said bank (R. pp. 2, 15), and an assessment was levied by the Comptroller upon all of the shareholders (R. pp. 3, 15). Demand upon all of the shareholders of said bank for the payment of said assessment was made by the receiver, including the demand upon the adult defendants herein, and upon defendant Beatrice C. Green as guardian of said minor defendants. Said

Beatrice C. Green (apparently in order to be qualified to defend a suit against the estate of Moses Green for the assessment upon the four shares of stock standing in the names of said minors) was duly qualified as Administratrix D. B. N., C. T. A., of the estate of said Moses Green, in accordance with the practice prevailing in South Carolina (R. pp. 3, 15), and thereupon demand was made by said receiver upon said Beatrice Green as administratrix of the estate of said Moses Green for payment of the assessment liability upon the four shares of stock standing in the names of said minors, Helen, Herbert, and Allen Green, and said administratrix refused to pay the same (R. p. 15).

The assets having been distributed to the defendants (including the minors) the Receiver prayed *judgment only*, as against the administratrix D. B. N. C. T. A., but prayed also that the assets held by the defendants (including the minors) be held subject to the assessment liability. (R. p. 4)

Answer was filed by Beatrice C. Green in her capacity as Administratrix D. B. N., C. T. A., and also as guardian for the minor defendants, wherein liability of the estate of Moses Green for said assessment was denied, and wherein also it was alleged that the attempted transfer by the executor, Leon M. Green, of the said four shares of stock to said minors, was without lawful authority, and that said infants were incapable of accepting the same, and that said transfer was not binding upon said infants. (R. pp. 5, 6) An answer on behalf of said infant defendants was also filed by one H. W. Hennig as guardian ad litem, wherein he adopted by reference the aforesaid answer of said Beatrice C. Green as administratrix and as guardian and submitted the interests of the minors to the protection of the court in accordance with the customary procedure. (R. p. 6) Answer was also filed by the four adult defendants denying assessment liability upon the four shares of stock standing in the name of the infants, and denying that the estate of Moses Green was liable for assessment upon said four

shares of stock, and also setting forth as a further defense that if they should be found to be liable for the payment of said assessment they were entitled to have the lands and property acquired by the minor defendants from the estate of Moses Green applied toward the payment of said assessment upon said four shares of stock (R. p. 7).

The Court of Common Pleas decided, inter alia: (1) that the attempted transfer of the four shares of stock to the minor defendants was void and ineffectual (R. pp. 17, 18); (2) that the four shares of stock should stand as though never transferred from the estate of Moses Green and that said estate, through said Beatrice C. Green as Administratrix D. B. N., C. T. A., must be considered the owner of said stock (R. p. 18); (3) that the assets of the estate of Moses Green received by all of the defendant distributees and legatees must stand subject to the payment of the assessment upon said four shares (R. p. 19); (4) that the assets of the estate acquired by the infant defendants should first be applied toward the payment of said assessment before recourse should be had to the assets acquired by the adult defendants (R. p. 20).

Appeal to the Supreme Court of the state of South Carolina was taken by all of the defendants *except the adult defendants.* (R. pp. 25, 27) The state Supreme Court (1) denied liability of the estate of Moses Green for the assessment (R. pp. 29, 30); (2) denied that the assets acquired from the estate by the defendants were subject to the payment of the assessment liability (R. p. 30); (3) reversed the judgment of the trial court in toto, *both as to the adult defendants who had not appealed,* as well as to the minor defendants and their representatives (R. p. 31). Additional facts are set forth in agreed statements of facts (R. pp. 8, 14-16).

D.

THE FEDERAL QUESTIONS.

Petitioner submits that the following Federal questions are shown by the Record:

(a) Determination of the issue of whether the estate of Moses Green retained ownership of the four shares of stock transferred to and registered in the names of the minor defendants (and not transferred to their guardian or to a trustee for their benefit) is clearly a Federal question involving the construction of the assessment statutes (Secs. 64 and 66, ch. 2, Title 12, U. S. Code) with reference to the well settled judicially determined legislative intent that there shall at all times be holders of stock in a national bank legally competent to acquire and hold the same and assume the liability incident thereto and that transfers of such stock to minors, or persons under other disabilities rendering them personally incapable of accepting title and liability, shall be ineffectual and inoperative and that such transferors shall remain the owners, at least so far as assessment liability is concerned. Concerning such legislative intent, see:

Early v. Richardson, 280 U. S. 496, 499;
Riley v. Bondi, 64 F. (2) 515, 517;
Aldrich v. Bingham, 131 Fed. 363;
Foster v. Wilson, 75 Fed. 797.

The trial court held (R. pp. 18, 19) that inasmuch as the transfer to the minor defendants was void and ineffectual, title to the stock remained in the estate, and that the estate was liable. The State Supreme Court, in substance, reversed the trial court in this respect and held that as the transfer of the stock to the minors was not the act of the testator and as the executor could not make a separate and independent contract binding the estate of the testator, the estate of the testator was not liable upon the assessment liability. Hence, the right claimed by the receiver under

the Federal statute (and the well settled construction and interpretation of such statute) to treat the estate of the testator as the owner of the stock and to hold such estate liable to the extent permitted by law was directly passed upon, as a matter of substance by the State Supreme Court and such right to recover under the Federal statute was denied.

(b) The State Supreme Court assigned as further reasons for its denial of the liability of the estate of Moses Green upon the stock assessment, (1) that no such claim "*existed*" against the estate during the orderly administration of the estate, and (2) that under the State statutes the claim could not be enforced against the assets of the estate due to the fact that the assets had been distributed and the estate closed years before the liability was sought to be enforced against the estate. (R. p. 30)

With reference to the first point, *i. e.*, whether the claim existed, it is submitted that the determination of such issues certainly requires the construction of the Federal assessment statutes so as to determine the *nature* of the assessment liability thereunder and whether it is of such character as to *exist* or constitute a claim against the estate during the period of administration of the estate in view of the fact that the bank was not then closed and the assessment had not been levied.

With reference to the second point, *i. e.*, the enforcement of the assessment claim notwithstanding the distribution of the assets, it is submitted that a substantial construction of the Federal statutes is required in order to determine whether the *nature* of the charge or lien arising from or based upon the contingent assessment liability is such as to follow the assets of the estate to the distributees and legatees even though distribution has been made before the assessment has been levied and to determine further in that connection whether State statutes or decisions concerning estates of decedents affect the lien created by the Federal assessment statutes so as to prevent said lien from following the assets.

In this connection petitioner will endeavor to show: that the decisions of this Court, and of other Federal courts, have construed said Federal assessment statutes in analogous cases and have held that said Federal assessment statutes do create a debt or obligation which *exists* as a charge or lien against the estate of a decedent notwithstanding the assessment may not have been levied at the time of administration of the estate; that said charge or lien, having been created by Federal statutes, follows the assets of the decedent upon which it is impressed and permits the assessment claim, by virtue of said lien, to be collected from said assets even though they may have been distributed to the heirs, distributees or legatees, and that said assets may be so followed regardless of the provisions of State laws and decisions contrary thereto.

In view of the foregoing it seems clear that the issues thus present under this subdivision of the discussion raised Federal questions substantial in nature, and that the determination of them involves a Federal question which is vital to the uniform enforcement of the assessment statutes.

It may be observed in this connection that the State Supreme Court, recognizing the problem presented, determined that the act of Congress was not sufficiently broad in scope to meet the situation and in that connection said:

> "It does not seem that either the act of Congress or the State statute imposing liability on stockholders in banks is sufficient to cover the very peculiar facts existing in this case." (R. p. 30)

It is obvious from this statement of the court that the court did construe the Federal statute and, in its opinion, found it wanting and consequently denied the right claimed by the receiver.

(c) It is well settled that a receiver of a national bank is an officer of the United States, and that he is acting as an officer of the United States when he is proceeding with the performance of his duties under the supervision and

direction of the Comptroller of the Currency, who is also an officer of the United States. In the instant case the receiver, as such officer, and incident to his duties in winding up the affairs of an insolvent national bank, filed suit to recover on behalf of the depositors and creditors of the bank, as an asset accruing for their benefit, an assessment that was levied, not by virtue of state law, but by virtue of the Federal statutes which (1) created the assessment liability, and (2) made that assessment liability a lien upon the assets of the estates of decedents. The denial of the right of recovery is a denial of rights sought to be enforced by a Federal officer under a Federal statute, and hence, in its essence, involves a Federal question.

In this connection may be noted the case of Rector, Trustee, v. City Deposit Bank, 200 U. S. 405, 411, 412, which was a suit instituted by a trustee in bankruptcy to recover from the City Deposit Bank the sum of $1300 which the trustee contended was a voidable preference over the other creditors. The trial court, and the Supreme Court of Ohio, each denied recovery. On appeal to the Supreme Court of the United States, the bank contended that no Federal question was involved, and made a motion to dismiss on that ground. In response to that contention this court said:

> "Both these contentions might well be disposed of by saying that *the action was brought by a trustee appointed under the bankrupt law of the United States, seeking to recover what was asserted to be an asset of the bankrupt estate under that law. This, therefore, presented a Federal question, and the denial of the asserted right was a denial of a right or title specially claimed under a law of the United States.*" (p. 411, Italics inserted)
>
> * * * * * * * * *
>
> "Applying this principle, we think *as the suit was brought by a trustee in bankruptcy in virtue of the power and authority conferred upon him by a law of the United States,* the certificate makes clear the fact, if it were otherwise doubtful, that rights under the

bankrupt law were relied upon and passed upon below. *And as, this being true, the right of the trustee in bankruptcy to recover thus depended upon a law of the United States, there was clearly jurisdiction within the purview of section 709 of the Revised Statutes. Nutt v. Knut,* 200 U. S. 12." (p. 412, Italics inserted)

Also see:

Yates v. Jones National Bank, 206 U. S. 158, 165, 167, 172, 175, 176, 177, 178, 180.
Logan County National Bank v. Townsend, 139 U. S. 67.
First National Bank of Grand Forks v. Anderson, 172 U. S. 573.
McCormick v. Market Nat. Bank, 165 U. S. 538.
Rankin v. Barton, 199 U. S. 228.

In Matteson v. Dent, 176 U. S. 521, recovery was sought by the receiver upon the stock assessment liability under circumstances quite analogous to the instant case so far as the basic principles are concerned. There seemed to be some disposition on the part of this court at that time (Opinion, p. 530) to hold that no substantial Federal question was involved, apparently on the theory that liability was being enforced against the distributees and legatees of the estate of the decedent to the extent of the assets received by them, in reliance upon the Minnesota law, and that consequently the real question involved concerned the effect of the state law taken in conjunction with the Federal law. It is here suggested that in view of the reasoning indicated in the later case (above cited and quoted) of Rector, Trustee v. City Deposit Bank, *supra,* and in other cases of like import, this court would probably now take the view, so far as the jurisdictional question in that respect is concerned, that the position tentatively taken in Matteson v. Dent was too narrow an interpretation of the jurisdictional limitations. At any rate, the instant case is distinguishable from Matteson v. Dent in the following respects:

(1) No question of ownership and title of the national bank stock was involved in Matteson v. Dent, for the reason that the same had remained of record in the name of the testator up to the time of the bringing of suit, whereas, in the instant case, the question of title and ownership of the four shares of stock attempted to be transferred to the minors, and whether that ownership remained in the estate, and thus rendered the estate liable for the assessment, is in issue.

(2) In the instant case the right to follow the assets will be predicated upon the lien created by the Federal assessment statute, regardless of the statutes or decisions of the state of South Carolina, whereas in Matteson v. Dent the pursuit of the assets was based upon the state statute.

Further in this connection it may be noted that section 24 of the Judicial Code (U. S. Code, Title 28, ch. 2, Sec. 41(16)) gives the Federal courts jurisdiction in cases involving the winding up of the affairs of insolvent national banks, regardless of diversity of citizenship, the amount involved, etc. From this it would seem to be a fair inference that Congress considered that questions arising in connection with the liquidation of the affairs of national banks involved the application and enforcement of the laws of the United States and the rights and privileges thereunder claimed, and hence that such matters should appropriately be brought within the jurisdiction of the Federal courts. The receiver could have brought this suit in the first instance in the Federal court, and in the event the suit had been determined adversely to him by the Circuit Court of Appeals, he could have applied for a writ of certiorari under sec. 240(a) of the judicial code (U. S. Code, Title 28, ch. 9, sec. 347(a)) without having to establish as a basis for staying in this court that a Federal question was involved. It seems reasonable to assert that such right to apply for certiorari was conferred in implied recognition of the fact that a Federal question would necessarily be involved in such litigation in which the receiver as an officer of the

United States was a party and was claiming a right under a Federal statute as an incident to the winding up of the affairs of a national bank. Does the fact that he is now seeking to review the judgment of a state court rather than the judgment of the Federal Circuit Court of Appeals, change the essential nature of the questions involved? We believe not.

(d) The state Supreme Court reversed the judgment of the trial court in toto and set aside the judgment in favor of the receiver not only as against the minor defendants but also as against the adult defendants. However, the adult defendants did not appeal from the judgment of the trial court. A judgment is clearly property. See Hoyt Metal Co. v. Atwood, 289 Fed. 453, 454, 455; Merchants Bank of Danville v. Ballou, 32 S. E. 481, 483; 98 Va. 112. The adult defendants not having appealed, and thus not being before the court, it would seem to follow that the setting aside of the judgment under such circumstances would constitute a deprivation of property "without due process of law" contrary to the 14th amendment to the Federal Constitution. It is submitted that this also raises a Federal question for determination by this court. While it is true that this aspect of the case was not passed upon by the State Supreme Court, it could not very well have been an issue before said court, inasmuch as it could not develop until the judgment had been rendered. The procedure from such a judgment permits application for writ of certiorari to review the same and it was not necessary, as indicated on page 6 of respondents memorandum filed in opposition to the granting of a writ of certiorari, that petitioner, in filing petition for rehearing before the state Supreme Court set up this ground as a prerequisite to avail himself of the right given by statute to apply for certiorari. As a matter of fact, however, although it is not shown by the printed record, we now find that this point was discussed in the petition for rehearing, and we attach hereto as an appendix, what we understand to be a correct copy,

although uncertified, of the petition for rehearing. This is inserted for such reference as the Court may see fit to make to the same in this connection.

E.

SPECIFICATION OF ERRORS.

(1) The State Supreme Court erred in holding that the estate of Moses Green did not remain liable when the attempted transfer of the four shares of stock to the minors by the executor was found to be void and ineffectual to pass title to said minors;

(2) The State Supreme Court erred in holding that no claim upon the assessment liability "*existed*" against the estate of Moses Green during the course of administration of the estate;

(3) The State Supreme Court erred in holding that the claim upon the assessment liability, not having been presented during the course of administration of the estate, could not be lodged against the estate after the distribution of assets and closing of the estate;

(4) The State Supreme Court erred in holding that the assessment claim could not be enforced and collected by pursuit of the assets of the estate into the hands of defendants as distributees and legatees of the estate;

(5) The State Supreme Court erred in holding that the judgment of the Court of Common Pleas should be reversed in toto, not only as against the defendant who did appeal, but also as against the adult defendants who did not appeal;

(6) In the alternative, and in the event this court should consider and find that the State Supreme Court had committed error in that it should have held that the transfer of stock to the minor defendants should properly be treated as an effective transfer with the title constructively held by the guardian of said minors on behalf of said minors, the State Supreme Court further erred in not holding that the

assets of the guardianship estate of said minors were liable under Sec. 66, Ch. 2, Title 12, U. S. C. for the amount of the assessment to the extent of the assets received from the estate of Moses Green.

F.

SUMMARY OF ARGUMENT.

I. The contingent assessment liability of Moses Green upon the four shares of stock in question survived his death and became a liability and charge or lien upon his estate. The State Supreme Court, having held that the attempted transfer of title of said stock to the defendants, Helen, Herbert, and Allen Green, minors, by Leon M. Green as executor of the estate of Moses Green, was void and ineffectual to transfer title, it follows that ownership and title of the stock never passed from the estate of Moses Green and that the estate continued liable. Such contingent liability ripened into absolute liability when the assessment was levied on or about August 26, 1932, notwithstanding the state probate court had entered an order a considerable period prior to such levy authorizing, and Leon M. Green as executor had made, distribution of the entire assets of the estate. The receiver was entitled to enforce collection of the assessment from the assets of the estate of Moses Green and could properly pursue such assets into the hands of all of the defendants holding the same, including said minors as distributees and legatees.

(a) The decision of the State Supreme Court that the attempted transfer of the four shares of stock to the minors was void, and ineffectual to transfer title, necessarily requires the conclusion, in consequence thereof, that title to such stock never passed from Moses Green and that his estate remained responsible for such liability as the law attached thereto incident to such ownership.

(b) The contingent assessment liability of Moses Green upon the four shares of stock survived his death, became a

liability and charge or lien upon his estate, became an absolute liability upon the levy of the assessment, and can be enforced by the receiver against the assets in the hands of the distributees and legatees (including the assets received by the minor defendants), notwithstanding the assets had been distributed and the estate closed a considerable period prior to the levy of the assessment.

(c) The laws of South Carolina make the debts and obligations of a decedent a charge or lien upon the assets of his estate, and in consequence permit the creditor to pursue the assets into the hands of the heirs, distributees and legatees.

(d) The Federal statutes create the assessment liability and make the same a charge or lien upon the assets of the estate of a decedent. Hence, regardless of state laws, such lien follows the assets into the hands of the distributees and legatees, and accordingly the court below was in error in holding that the assets of the estate of Moses Green were not traceable to the defendants as distributees and legatees of said estate.

II. In the alternative, and in the event this court should consider and find that the State Supreme Court had committed error in that it should have held that the transfer of stock to the minor defendants should properly be treated as an effective transfer with the title constructively held by the guardian of said minors on behalf of said minors, the, State Supreme Court further erred in not holding that the assets of the guardianship estate of said minors were liable under Section 66, Ch. 2, Title 12, U. S. C. for the amount of the assessment to the extent of the assets received from the estate of Moses Green. This Court may, if it sees fit, review the whole case and consider the present contention.

III. The State Supreme Court was in error in reversing the judgment of the Court of Common Pleas in so far as the same affected the adult defendants, for the reason that said adult defendants did not appeal from the judgment of the Court of Common Pleas.

G.

ARGUMENT.

I. The contingent assessment liability of Moses Green upon the four shares of stock in question survived his death and became a liability and charge or lien upon his estate. The State Supreme Court, having held that the attempted transfer of title of said stock to the defendants, Helen, Herbert, and Allen Green, minors, by Leon M. Green as executor of the estate of Moses Green, was void and ineffectual to transfer title, it follows that ownership and title of the stock never passed from the estate of Moses Green and that the estate continued liable. Such contingent liability ripened into absolute liability when the assessment was levied on or about August 26, 1932, notwithstanding the state probate court had entered an order a considerable period prior to such levy authorizing, and Leon M. Green as executor had made, distribution of the entire assets of the estate. The receiver was entitled to enforce collection of the assessment from the assets of the estate of Moses Green and could properly pursue such assets into the hands of all of the defendants holding the same, including said minors as distributees and legatees.

(A) THE DECISION OF THE STATE SUPREME COURT THAT THE ATTEMPTED TRANSFER OF THE FOUR SHARES OF STOCK TO THE MINORS WAS VOID, AND INEFFECTUAL TO TRANSFER TITLE, NECESSARILY REQUIRES THE CONCLUSION, IN CONSEQUENCE THEREOF, THAT TITLE TO SUCH STOCK NEVER PASSED FROM MOSES GREEN AND THAT HIS ESTATE REMAINED RESPONSIBLE FOR SUCH LIABILITY AS THE LAW ATTACHED THERETO INCIDENT TO SUCH OWNERSHIP.

The fifth paragraph of the answer of Beatrice C. Green, as administratrix D. B. N., C. T. A., and also as guardian of the minor defendants, asserted that the attempted transfer of the four shares of stock to the minors was illegal and void (R. pp. 5, 6). The Court of Common Pleas sus-

tained this contention (R. pp. 17, 18). The decision of the state Supreme Court also held that the attempted transfer to the minors was void and ineffectual (R. pp. 29, 30). No error is here assigned by petitioner concerning the ruling of the state Supreme Court upon this specific point, and hence the same stands as a final adjudication for the purposes of the present discussion, that title to said stock did not pass to said minor defendants.

It would seem necessarily to follow from said adjudication that if the attempted transfer of title of the four shares of stock by the executor to the minors was void, the title and ownership of the stock, and the consequent assessment liability, remained in the estate of Moses Green. Such was the decision of the trial court:

> "From the authorities above cited it would appear that if the testator, during his lifetime had transferred the stock to his infant grandchildren, and had survived to this day (fol. 20) that he would be liable for the assessment so levied by the Comptroller.
>
> "It appears to me, therefore, that the administratrix D. B. N. C. T. A., who is the legal representative of the testator *would stand in his shoes*, for as was stated in the case of Smith v. Byers, 102 S. C. 218, 'In fact he (the executor) was the testator (Henry Clark) in possession and he could not claim any rights inconsistent with his duty.'
>
> "It therefore follows, that if the testator were living he would be responsible for the assessment, so far as the four shares, which were placed in the names of his infant grandchildren, are concerned.
>
> "The Court having avoided the contract for the infants, the stock is as though the same had never been transferred from the estate of the testator, Moses Green, and the administratrix D. B. N. C. T. A., being in fact the testator under the authority of Smith v. Byers, *supra*, is the owner of the said four shares of stock." (R. 18)

In support of its position to the foregoing effect the Trial Court cited, inter alia: Aldrich v. Bingham, 131 Fed. 363;

Foster v. Wilson, 75 Fed. 797; Early v. Richardson, 280 U. S. 496. A further case of interest in this connection is Riley v. Bondi, 64 Fed. (2) 515, 517.

The case of Williams vs. Cobb, 242 U. S. 307, 309, 310, supports, by inference, the position that the estate remains liable where the transfer is ineffective because of lack of capacity to accept title or lack of authority to make the transfer. In that case apparently the only reason the estate was not held liable and the assets not permitted to be pursued, was that the transfer of stock had been made to Trustees who were competent to hold title. Accordingly recourse against the estate of the decedent should have been denied, leaving the Receiver to his remedy against the estate of the Trustees held for the beneficiary, under Sec. 66, Ch. 2, Title 12, U. S. C.

It would seem that the reasoning of the trial court is sound and the conclusion there reached inevitable, and consequently, *that the state Supreme Court was in error in holding, in effect,* that the estate of Moses Green did not retain ownership and did not continue liable upon the stock.

The reasoning of the *state Supreme Court* (and its conclusion in the foregoing respect) is not convincing. The opinion on this point states:

> "Moses Green did not make the transfer to his minor grandchildren * * *. As this transfer was not the act of the testator, then the estate of the testator is not liable therefor. That the executor could not make a separate and independent contract tending to bind the estate of the testator is too well established to warrant the citation of authority in support thereof." (R. p. 29)
>
> * * * * * * * * *
>
> "If, therefore, as shown above, the estate of the grandchildren is not liable, for the reason that they could not assume the contractual obligation, and the estate of the testator is not liable, for the reason that the transfer to the grandchildren was not made by him and the executor had no right to make a contract bind-

ing the estate, it follows that no liability for this contingent indebtedness can be placed upon any one or more of the defendants." (R. p. 30)

(B) THE CONTINGENT ASSESSMENT LIABILITY OF MOSES GREEN UPON THE FOUR SHARES OF STOCK SURVIVED HIS DEATH, BECAME A LIABILITY AND CHARGE OR LIEN UPON HIS ESTATE, BECAME AN ABSOLUTE LIABILITY UPON THE LEVY OF THE ASSESSMENT, AND CAN BE ENFORCED BY THE RECEIVER AGAINST THE ASSETS IN THE HANDS OF THE DISTRIBUTEES AND LEGATEES (INCLUDING THE ASSETS RECEIVED BY THE MINOR DEFENDANTS), NOTWITHSTANDING THE ASSETS HAD BEEN DISTRIBUTED AND THE ESTATE CLOSED A CONSIDERABLE PERIOD PRIOR TO THE LEVY OF THE ASSESSMENT.

The trial court relied in part, in support of its findings to the foregoing effect, upon the case of Matteson v. Dent, 176 U. S. 521. We believe that case established the following principles:

(1) The contingent assessment liability of a shareholder of a national bank is a debt or obligation within the meaning of the assessment statutes, and survives against and becomes a charge or lien upon his estate. (See Opinion, pp. 524-525, 526-527.)

(2) Such liability and lien continue against the estate so long as the stock is not transferred upon the books of the bank from the name of the deceased stockholder. (See Opinion, pp. 526, 527-528, 530.)

(3) The fact that assessment had not been levied at the time of distribution of assets of an estate (termed "allotments" in the case) does not prevent the contingent liability for assessment from constituting a debt or obligation of the estate and a lien thereon within the meaning of the assessment statutes at the time of such distribution or allotment. (See Opinion, p. 529.)

(4) The liability of the estate for the assessment being established under the foregoing rules, the Receiver can enforce such liability against the allottees or distributees un-

der a state law making them liable for the debts of the estate to the extent of the assets received by them from the estate. (See Opinion, pp. 528-530, 532.)

It will be found from an examination of the case that the first three of the foregoing principles are established without reference to the state law, and as an interpretation and construction of the Federal assessment statutes and their operative effect. The fourth principle only concerns the State law, and then only from the standpoint of the right of the receiver to adopt the State procedure in the pursuit of the assets for the purpose of enforcement and collection of the assessment.

Applying the foregoing principles to the instant case, it follows: that the contingent assessment liability of Moses Green upon the four shares of stock in question survived his death and became a liability of, and a charge or lien upon, his estate; that inasmuch as said stock, in legal effect by virtue of the adjudication of the court below, must be considered to have stood upon the books of the bank in the name of the testator, and so stood at the time the assessment was levied and the suit was filed, the estate of Moses Green continued to be responsible for the assessment and charged with a lien for its payment; and that said liability and lien were not affected by the fact that the assessment had not been levied at the time of distribution of the assets of the estate. Hence, considered (for the purpose of argument only) from the standpoint of the *state* law in conjunction with the *Federal* law, *it follows that if the laws of South Carolina permit a creditor to pursue assets of the estate of a decedent into the hands of distributees and legatees, the court below was in error* in holding that the assets of the estate of Moses Green could not be traced to the hands of the defendants, including the minor defendants, for the purpose of satisfying the assessment liability.

The discussion next following (under sub-paragraph (c) of this division of the argument, pp, 21 to 25) will discuss the South Carolina law in that connection. However,

it is also the position of petitioner, as will more fully hereinafter appear (sub-paragraph (d) of this division of the argument, pp. 26, *infra*) that the lien for the assessment liability, having been created by Federal law, follows the assets to the heirs, distributees and legatees and may be enforced regardless of the provisions of state laws.

(c) THE LAWS OF SOUTH CAROLINA MAKE THE DEBTS AND OBLIGATIONS OF A DECEDENT A CHARGE OR LIEN UPON THE ASSETS OF HIS ESTATE, AND IN CONSEQUENCE PERMIT THE CREDITOR TO PURSUE THE ASSETS INTO THE HANDS OF THE HEIRS, DISTRIBUTEES AND LEGATEES.

The Applicable Statutes of South Carolina making the Assets of the Estate of a Decedent liable or chargeable for his Debts and Obligations.

Sec. 8995, Civil Code, S. C., 1932:

> "The assets which come to the hands of an executor, or administrator, after proper allowance to the executor or administrator, in a due course of administration, shall be applied to the payment of his debts in the following order, that is to say: * * *".

Sec. 9066, Civil Code, S. C., 1932:

> "Houses, lands and other hereditaments and real estates, situated or being within this State, belonging to any person indebted shall be liable to and chargeable with all just debts, duties and demands of what nature and kind soever, owing by any such person, and shall and may be assets for the satisfaction thereof, and shall be subject to the like remedies, proceedings and process as personal estates."

Sec. 9032: "In all cases where any heir at law shall be liable to pay the debt of his ancestor in regard of any lands, tenements, or hereditaments, descending to him, and shall sell, alien, or make over the

same before any action brought against him, such heir at law shall be answerable for such debt or debts to the value of the said land so by him sold, aliened, or made over.

Sec. 9033: In any of the cases referred to in the last section, creditors shall be preferred as in actions against executors and administrators, and execution shall be taken out upon any judgment or judgments so obtained against such heir, to the value of the said land as if the same were his own proper debt or debts, saving that the lands, tenements, and hereditaments, bona fide aliened before the action brought, shall not be liable to such execution."

The foregoing statutes constitute a reiteration of the ancient non-statutory rules of law under which the assets of the estate of a decedent have always been held chargeable for his debts. These doctrines permit the pursuit of the assets into the hands of heirs, distributees and legatees for the purpose of satisfying the claim of the creditor notwithstanding the assets of the estate may have been distributed and the estate closed a substantial period of time prior to the enforcement of the claim of the creditor against the assets. See Leavenworth Savings & Trust Co. vs. Newman, 23 F. (2) 835, 837; Borer v. Chapman, 119 U. S. 587, 599, 600; Board of Public Works v. Columbia College, 17 Wall. 521, 530; Continental National Bank v. Heilman, 81 Fed. 36, 42, 43, 44 (assets distributed and estate closed); Pyatt v. Waldo, *et al.*, 85 Fed. 399, 400; Chewett v. Moran, 17 Fed. 820, 821, 822 (assets distributed and estate closed); Johnson v. Colbertson, 79 Fed. 5, 6 (assets distributed and estate closed); O'Neill v. Lauderdale, 195 Pac. 121, 124 (assets distributed and estate closed); Chitty v. Gillett, 148 Pac. 1048, 46 Okla. 724 (assets distributed and estate closed); Madison v. Buhl, 8 Pac. (2) 271, 272 (assets distributed and estate closed); Mortimer, *et al.* v. Potter, 72 N. E. 817, 818;

213 Ill. 178. Also see cases cited 18 C. J., par. 308, page 954, note 11.

The South Carolina decisions are to the same effect:

Lanier v. Griffin, 11, S. C. 565, 581-588:

The facts in this case are quite involved and are set forth in great detail in the opinion. Suffice it to say for present purposes, that it involved the right of a creditor of the estate of a decedent to pursue the assets into the hands of heirs, distributees and legatees for the satisfaction of her claim, suit being brought for that purpose about ten years after the settlement of the estate. *The claim of the creditor was contingent in character,* being based upon a bond given by the surety of a guardian who was accountable to the plaintiff-creditor. Paragraphs 3 and 4 of the syllabus epitomize the findings and decision of the Court in so far as pertinent to the instant case, and are as follows:

> "(3. Limitation of Actions—72.)
> "The estate of a deceased surety on a guardianship bond was duly settled up in 1858, without knowledge by executors or others in interest of this liability. The ward married in 1866, and by ante-nuptial settlement her property was assigned to a trustee; in 1867 she attained her majority; in 1868, an action was commenced by the trustee and herself, against executors, legatees and devisees of the surety, demanding payment by them of her claim. Held, that the action was not barred as against any of them by the statute of limitations. Cases reviewed.
> "(4. Wills—830.)
> "Held further, that the legatees and devisees were liable to the ward to the extent of assets received, but that no personal liability attached to the executors."

McNair v. Howle, 116 S. E. 281, 286; 123 S. C. 252.

In this case the assets of the estate of the decedent had been fully distributed and the creditor-plaintiff had failed to file his claim with the administrator within the statutory

period of twelve (12) months provided for the proof of claims. About six months after the discharge of the administrator the plaintiff-creditor made claim against the estate, and in anticipation of a suit against the estate to establish the claim notwithstanding the distribution of the assets, the former administrator, in conformity to the practice prevailing in South Carolina, filed a petition for appointment as administrator D. B. N. The plaintiff-creditor thereupon filed suit and the court held that inasmuch as the estate was solvent the assets in the hands of the distributees and legatees could be followed. The court also pointed out that there were no "*non-claim*" statutes in South Carolina and that the statute requiring proofs of claim against the estate within the specified twelve (12) months (above referred to) had as its primary object the exemption of executors and administrators from liability for devastavit where they had administered and distributed the estates in their charge without reserving assets which would otherwise have been applicable to the delinquent creditor's claim (the statute referred to in the case is carried forward in substantially the same form in this respect as Sec. 8993, Civil Code, S. C., 1932). It may also be observed in this connection that the foregoing case established as a matter of procedure that it was proper to make the distributees and legatees parties *jointly* with the administrator D. B. N. where it was sought to subject the assets received by such distributees and legatees to the payment of the claim. It is in accordance with this procedure, prevailing in South Carolina, that the distributees and legatees, including the minor distributees and legatees, were made co-defendants with Beatrice C. Green, Administratrix D. B. N. C. T. A. For additional South Carolina cases holding that assets of an estate may be pursued into the hands of distributees and legatees for the satisfaction of the claims of creditors, see: Columbia Theological Seminary v. Arnett, *et al.*, 176 S. E. 465; 168 S. C. 272; Hug-

gins v. Oliver, 21 S. C. 147, 161; Wheeler v. Floyd, 24 S. C. 413, 418, 419, 420; Shaw v. Barksdale, 25 S. C. 204, 214, 215; Brock, *et al.* v. Kirkpatrick, 60 S. C. 322, 38 S. E. 779, 784, 786, 788; Crane, Boylston & Co. v. Moses, 13 S. C. 561, 579.

The liability of the distributees and legatees is restricted, under the foregoing principles, to not exceeding the amount of assets received by them from the estate. In the instant case it may be noted that not only the personal property (R. 8) but the real property (R. 16) respectively, received by the distributees and legatees, including the pro rata shares received by the minor defendants, was far in excess of the amount necessary to meet the assessment liability upon the four shares of stock in question.

Application of the Foregoing Principle of Estate Liability, to Stock Assessment Obligation.

Assuming that it has been satisfactorily developed from the preceding discussion that under the South Carolina law the assets of an estate may be followed into the hands of a distributee or legatee, and the case of Matteson v. Dent having established that this principle may be applied to national bank stock assessment liability, no further citations would appear to be necessary in that connection. Attention may be directed, by way of cumulative authority, to the following assessment cases: Luce v. Thompson, 36 Fed. (2) 183, 185, 186; Zimmerman v. Carpenter, 84 Fed. 747 (see discussion of this case, *infra*, pg. 29); Mann v. Kleisdorff, 16 Fed. (2) 997; Rankin v. Miller, 207 Fed. 602; Gilbertson v. McCarthy, 32 Fed. (2) 665; Rankin v. City of Big Rapids, 133 Fed. 670; Rankin v. Herod, 140 Fed. 661. Also see the following State cases; Gift v. Love, 144 So. 562, 567 (where the estate had been fully administered and closed); Carlisle v. Love, 155 So. 197, 203 (where the estate had been fully administered and closed); Mortimer, *et al.* v. Potter, 72 N. E. 817, 818; 213 Ill. 178.

(D) THE FEDERAL STATUTES CREATE THE ASSESSMENT LIABILITY AND MAKE THE SAME A CHARGE OR LIEN UPON THE ASSETS OF THE ESTATE OF A DECEDENT. HENCE, REGARDLESS OF STATE LAWS, SUCH LIEN FOLLOWS THE ASSETS INTO THE HANDS OF THE DISTRIBUTEES AND LEGATEES, AND ACCORDINGLY THE COURT BELOW WAS IN ERROR IN HOLDING THAT THE ASSETS OF THE ESTATE OF MOSES GREEN WERE NOT TRACEABLE TO THE DEFENDANTS AS DISTRIBUTEES AND LEGATEES OF SAID ESTATE.

The general doctrine is thoroughly settled that the national banking laws are a system complete within itself, covering the organization, supervision, and liquidation of national banks, and that the laws of the states will not be permitted to impinge upon or interfere with the operative effect of the Federal provisions.

Cook County National Bank v. United States, 107 U. S. 445, 448;
California Bank v. Kennedy, 167 U. S. 362, 366;
Davis v. Elmira Savings Bank, 161 U. S. 275;
Easton v. Iowa, 188 U. S. 220;
Texas & Pacific Railroad v. Pottorff, 291 U. S. 245, 253;
First National Bank v. Missouri, 263 U. S. 640.

It follows from the foregoing that where, as in the instant case, the Federal law has provided, incident to the liquidation of national banks, not only for assessment liability (sec. 64, ch. 2, Title 12, United States Code), but in effect that such assessment liability, even though contingent or inchoate, shall constitute a lien upon the assets of the estate (sec. 66, ch. 2, Title 12, United States Code; Matteson v. Dent, *supra*), *no state law nor interpretation of the law of a state can defeat the enforcement of the lien and the pursuit of the assets* into the hands of distributees and legatees. In this connection may be noted the following:

Borer v. Chapman, 119 U. S. 587, 600 (*referring to the jurisdiction of equity to pursue assets to satisfy debts of a decedent*):

"As a part of the ancient and original jurisdiction of courts of equity, it is vested, by the Constitution of the United States and the laws of Congress in pursuance thereof, in the Federal court, to be administered by the Circuit courts in controversies arising between citizens of different states. It is the familiar and well settled doctrine of this court that this jurisdiction is independent of that conferred by the states upon their courts, and cannot be affected by any legislation except that of the United States." (p. 600)

Continental National Bank v. Heilman, 81 Fed. 36, 44:

"These cases settle the doctrine that the statute of a state prescribing the time within which a suit must be brought against heirs to charge them with an ancestral debt cannot be invoked for their protection in the national courts." (p. 44)

Mortimer, et al. v. Potter, 72 N. E. 817, 818; 213 Ill. 178:

In this case, Charles Kavanagh, the stockholder of a national bank, died, and the assets of his estate had been delivered to trustees under a trust created under the will and the decedent's state had been settled more than twenty years before the assessment was levied. The stock apparently remained of record in the name of decedent and checks for dividends were made payable to Charles Kavanagh and were endorsed by the widow as co-trustee under the trust. The receiver sued the surviving trustee, as trustee (the widow having died), and the distributees receiving the assets of the estate, and also the surviving trustee personally. The court affirmed the judgment of the lower court rendering judgment to take effect primarily against the surviving trustee, secondarily against the legatees and distributees, and ultimately against the trustee personally, for the assets of the estate to the extent necessary to meet the assessment. The defense raised the point, inter alia, that

the claim was barred because not presented within two years as required by state law. In overruling this contention and holding that the state statute was ineffective against the Federal statutes, the court said (p. 818, Reporter Citation):

> "It is next insisted by appellants that, even though this claim is valid against the estate, yet it cannot be enforced because it is barred by the statute of limitations, not having been presented for probate against the estate of Kavanagh within two years after the granting of testamentary letters. The claim against his estate is not by virtue of the laws of this state, but under the provisions of the foregoing federal statute. In addition to this at the time the administration of his estate was closed the claim had not accrued. The liability arose more than 20 years after the expiration of the 2 years within which claims could have been filed by it in the probate court. But the remedy under the act of Congress is applicable, *and the estate is liable under its provisions, so long as the assets can be reached.* The case of Zimmerman v. Carpenter (C. C.), 84 Fed. 750, involved this same question. It was there claimed that a plea of the statute of limitations, based upon the statute of the state of South Dakota regulating the time in which claims should be presented for allowance or rejection against the estate, barred the claim there presented. In considering the question the court said: 'Any theory upon which it is sought to maintain that the claim here attempted to be enforced is an ordinary claim against the estate of the deceased, to be represented and allowed in the manner required by the laws of the state of South Dakota, and, if not so presented and allowed, to be forever barred by the statute, involves a total misconception of the object, meaning, and effect of sections 5151 and 5152 of the Revised Statutes of the United States (U. S. Comp. St. 1091, p. 3465). Congress provided by these sections that the estate of the testator in the hands of an executor should be liable in like manner and to the same extent as the testator would be if living and competent to act and hold the stock. By the language of section 5152 the

> death of the testator does not in any way affect the liability of the estate, except, if no liability on the stock arises until after the estate is fully distributed, then there would be no estate to be charged.' Under the facts in this case the liability attached while the assets were in the hands of the trustee, and therefore came directly under the provisions of section 5152, *supra.*" (Italics inserted)

The case of Zimmerman v. Carpenter, 84 Fed. 750, quoted in the foregoing extract from the opinion, contains the statement: "if no liability on the stock arises until after the estate is fully distributed, then there would be no estate to be charged." An examination of the Carpenter case indicates that inasmuch as the assets had *not* been distributed, the foregoing observation of the court is obiter dictum and may be disregarded. It is clearly not sound as a matter of law, inasmuch as it is contrary to the cases holding that the assets may be followed to the hands of heirs, devisees, and distributees by virtue of the lien upon said assets for the payment of the debts of the decedent.

For additional cases to the effect that state laws cannot affect the operation of the Federal statutes in this connection, see:

> *Payne v. Hook*, 7 Wall. 425, 430.
> *Chewett v. Moran*, 17 Fed. 820.

It is obvious that if statutes or decisions of a state are to be permitted to bar the enforcement of the assessment liability against heirs, legatees, distributees, where the Federal law has expressly imposed a lien upon the estates of decedents (and with reference to which lien and liability all purchasers of national bank stock must take notice), the purposes of the National Banking Act designed to protect the creditors of the bank in the event of insolvency will be defeated. As indicated, such construction is entirely contrary to the decided cases. To the effect that sec. 66 *does*

impose a lien upon the assets of the estates therein mentioned see:

Gilbertson v. McCarthy, 32 Fed. (2) 665, 667, 668; Luce v. Thompson, 36 Fed. (2) 183, 184, 185; Rankin v. Miller, 207 Fed. 602, 613, 614, 616; Miller v. Hamner, 269 Fed. 891, 894; Rankin v. City of Big Rapids, 133 Fed. 670, 680, 681; Rankin v. Herod, 140 Fed. 661; Drain v. Stough, 61 Fed. (2) 668, 669.

For cases specifically to the effect that the Federal decisions and the principles of law thereby established, must be followed in construing the national banking laws, see:

Davis v. Elmira Savings Bank, 161 U. S. 275; Easton v. Iowa, 188 U. S. 220; First National Bank v. Selden, 120 Fed. 212, 215; Farmers & Mechanics National Bank v. Dearing, 91 U. S. 29; Prigg v. Pennsylvania, 16 Peters 539, 617-619; First National Bank of San Jose v. California, 262 U. S. 366.

Applying the foregoing to the instant case, it would seem clear that the State Supreme Court was in error in deciding that the receiver could not hold the estate of Moses Green liable for the assessment and trace the assets of the estate to the distributees and legatees, including the assets received by the minor defendants, for the purpose of recovering the amount of the assessment upon the four shares of stock in question.

II. In the alternative, and in the event this court should consider and find that the State Supreme Court had committed error in that it should have held that the transfer of stock to the minor defendants should properly be treated as an effective transfer with the title constructively held by the guardian of said minors on behalf of said minors, the State Supreme Court further erred in not holding that the assets of the guardianship estate of said minors were liable under Section 66, Ch. 2, Title 12, U. S. C., for the amount of the assessment to the extent of the assets received from the

estate of Moses Green. This Court may, if it sees fit, review the whole case and consider the present contention.

The question of the liability of the estate of the minor defendants for the assessment liability under Sec. 66 of Ch. 2 of Title 12, U. S. Code was in issue and was considered by the State Supreme Court and, as previously indicated, it was decided that the attempted transfer of the four shares of stock in question to the minor defendants was void and ineffectual to pass title.

The executor in transferring said stock had the same registered upon the books of the bank in the names of the minors. If it be considered that the intent of the testator should be given effect by treating the title to said shares of stock as standing constructively in the name of the guardian of the estate of said minors, it would follow that the assets of the guardianship estate would be responsible for the assessment at least to the extent received from the estate of Moses Green. Hence, whichever view be adopted, whether on the theory of title remaining in the testator, Moses Green, with the consequent liability on his estate and the right to pursue the assets to the distributees and legatees, including the minors, or whether upon the theory of title passing constructively to the guardian of said minors, with the consequent liability of the guardianship assets for the assessment under Sec. 66, Ch. 2, Title 12, U. S. C., the result would be the same so far as the Receiver is concerned and would permit recovery by the receiver from said assets for the amount of the assessment. It will be recalled in this connection that the minors, as well as each of the adult defendants, received personal as well as real estate, greatly in excess of the amount of the assessment. (R. pp. 8, 16) Hence, considering this matter from the standpoint of an alternative assignment of error, the state Supreme Court committed error in not permitting the assets of the minor defendants to be applied toward the payment of the stock assessment.

It is, of course, settled practice that this court may, if it sees fit, review the entire case, and decree such relief as may be appropriate under all of the circumstances. Cole v. Ralph, 252 U. S. 286, 290.

III. The State Supreme Court was in error in reversing the judgment of the Court of Common Pleas in so far as the same affected the adult defendants, for the reason that said adult defendants did not appeal from the judgment of the Court of Common Pleas.

The appeal from the decision of the Court of Common Pleas to the State Supreme Court was taken only by Beatrice C. Green as administratrix, D. B. N., C. T. A., of the estate of Moses Green, deceased; Beatrice C. Green, as guardian for Helen Green, Herbert Green and Allen Green; and H. W. Hennig, as guardian ad litem for Helen Green, Herbert Green and Allen Green (R. pp. 25, 27).

The State Supreme Court held, that the assessment could not be collected from the assets taken over by *any of* the defendants as distributees and legatees, and the effective part of the decision or decree provided:

> "The judgment of the Circuit Court is, therefore, reversed and the complaint dismissed under Rule 27 of this court." (R. p. 31)

It would seem clear that the State Supreme Court was in error in reversing the decision of the Court of Common Pleas in so far as the judgment of the Court of Common Pleas related to and was binding upon the adult defendants who did not take an appeal to the State Supreme Court. It is true that in the course of rendering its decision and as an integral part of its reasoning in the opinion, the State court could appropriately *take the view* that *none* of the defendants as distributees and legatees (including the adult defendants) could be held responsible for the assessment liability to the extent of the assets received as such dis-

tributees and legatees. Nevertheless, when the decree was formulated putting its decision into effect, it would seem that the State Supreme Court properly *should have provided* that the judgment of the Court of Common Pleas must be reversed *only* in so far as the same sought to hold the assets acquired by the infant defendants as distributees and legatees and that such reversal *should not affect* the judgment of the Court of Common Pleas subjecting the assets acquired by the adult defendants as distributees and legatees to the payment of the assessment.

It may also be suggested that where a judgment has been rendered from which no appeal has been taken, the judgment creditor acquires a vested property right, and it would consequently appear that the action of the State Supreme Court in setting aside said judgment in the absence of appeal by the defendants against whom it is operative, constitutes in effect a deprivation of the receiver of his property in said judgment without due process of law, contrary to the Fourteenth Amendment. Also see discussion in this connection, *supra*, p. 12.

H.

CONCLUSION.

We believe, in view of the foregoing, that this court has jurisdiction to review the judgment of the court below, and that said judgment should be reversed.

Respectfully submitted,

GEORGE P. BARSE,
RAYMON SCHWARTZ,
Attorneys for Petitioner,

F. G. AWALT,
J. H. BREWER, JR.,
Attorneys for Comptroller of Currency,
Of Counsel.

I.

APPENDIX.

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT.

J. C. SEABURY, as Receiver of the City National Bank of Sumter, S. C., a national banking association, *Respondent,*

against

BEATRICE C. GREEN, Administratrix D. B. N., C. T. A., of the estate of Moses Green, deceased, LEON M. GREEN, ALVA I. GREEN, AARON H. GREEN, ETHEL GREEN BLATT, BEATRICE C. GREEN, as Guardian for Helen Green, Herbert Green and Allen Green, and HELEN GREEN, HERBERT GREEN and ALLEN GREEN, *Defendants.*

IN RE: Beatrice C. Green, Administratrix D. B. N., C. T. A., of the Estate of Moses Green, deceased; Beatrice C. Green as Guardian for Helen Green, Herbert Green and Allen Green, and H. W. Hennig, as Guardian ad litem for Helen Green, Herbert Green and Allen Green, *Appellants.*

PETITION FOR REHEARING.

To the Honorable Chief Justice and Associate Justices of the State of South Carolina:—

The petition of the undersigned petitioner, who is the attorney for the respondent in this cause, respectfully calls to the attention of the Court points which your petitioner thinks that the Court has overlooked or misapprehended in rendering your decision in the above entitled cause.

I.

That in the opinion of the Court this language is used "it follows that no liability for this contingent indebtedness can be placed upon *any one or more of the defendants.*"

It is respectfully submitted that four of the defendants in this cause, never appealed from the judgment rendered against them. That is, under the Decree of his Honor

Judge Mann, the inheritance of the four *adult* defendants under the Will of Moses Green, deceased, was subjected to the payment of this statutory liability and since no appeal was taken from that Decree by any of the four adult defendants, the question is *res adjudicata* as to them and stands as a judgment in rem against such property as they hold as devisees of Moses Green, deceased.

If a party is aggrieved by any Order or Decree of the Court, he has a right to appeal and failing to do so, he is bound by the Decree or Order against him. That being so, the Decree of Judge Mann fixes the liability of the adult defendants, so far as to the property which they took under the Will of Moses Green, deceased, is concerned. That property is subject to the Four Hundred ($400.00) Dollar assessment set forth in the Complaint, there being a judgment in rem against it, and it is respectfully submitted that this Court has overlooked this fact and the opinion should be corrected accordingly.

II.

It is respectfully submitted that attention is called to paragraph 12 of the Complaint (F. 13) as follows, "the real and personal property in the hands of the defendant (other than the administratrix D. B. N., C. T. A., of the Estate of Moses Green, deceased) as heirs at law (as devisees) of the said Moses Green, deceased, is subject to the assessment as above set forth." And the Answer of Leon Green and the other adult defendants (F. 28), does not controvert this. This Answer has two aspects. In the first aspect (first defense) these adult defendants deny that they are personally liable for this assessment and deny that the estate of Moses Green is liable for it. In the first place, there is no allegation in the complaint that the adult defendants are personally liable for the assessment, and in the second place this is no denial of any allegation of the complaint. And in the next place, that the Estate of Moses

Green is liable is not any denial of any allegation of the complaint, and states no fact but only a conclusion and is respectfully submitted that the so-called First Defense, is no defense at all. That it does not conform to the rule of pleading; that all facts stated in the complaint are deemed to be true unless controverted. In addition to this, these adult defendants filed an argument, the burden of which is that the property received by them, from the estate of Moses Green, should not be liable unless that property received by the minors should be insufficient to meet the assessment.

It is respectfully submitted that the Court has given relief to these defendants, that they practically have not sought and as a matter of law they are not entitled to it, and for the reason, first, that they have not set up any defense in their Answer, as we have attempted to show, and the next place, judgment having gone against them and they not having appealed, their liability became fixed by the judgment of the Circuit Court, and, at the most, this Court could only relieve the appellants.

III.

The Court, in the opinion in this case, holds, first that the Estate of Moses Green is not liable, and second, that none of the devisees and legatees under his Will are liable to the extent of the property taken by them as such.

This conclusion is reached by the reasoning of the Court that "Moses Green did not make the transfer to his minor grandchildren, they took the stock as allotted to them by the executor in making a division of the estate, in the residuary clause contained in the Will. The instructions for division of the residuary estate into five parts, no where said that the grandchildren should receive any portion of the bank stock."

That under Item 9 of the Will, the testator divided the balance of his estate as follows: "All the rest and residue

of my estate, real, personal or mixed, of which I may be possessed or entitled to at the time of my death, shall be divided as follows: *one-fifth* thereof to the children of my deceased son, Harry Green, namely Helen, Herbert and Allen," and it is respectfully submitted that by the use of the word "thereof" the testator specifically intended for the executor to divide the property in kind, giving to the children of the deceased son, Harry Green, one-fifth thereof. Had he not intended for the property to be divided in kind, including the bank stock, he would have used words similar to these, "one-fifth of my estate to my grandchildren"; but the use of the word "thereof" clearly imports that the testator directed his Executor to divide the bank stock together with the other property in kind, if the same were divisable; the Will did not provide that the stock should be sold and the proceeds distributed, but that the Estate should be divided.

"It is the right and duty of a personal representative * * * to make distribution of decedent's property in the manner directed by the Will * * * or in case of intestacy * * * in the manner prescribed by law." 24 C. J., 463. Therefore, if he directed the same to be divided, then it was the same as though he had given the bank stock during his lifetime to his infant grandchildren, and the liability of the estate would be the same.

IV.

The Court uses the following language "as this transfer was not the act of the testator, then the estate of the testator is not liable therefor."

It is respectfully submitted that the act was the act of the testator with directions to the executor to divide the property into fifths, the period for distribution to be made, of course, after his death by his executor, but the gift itself was the gift of the testator under his Last Will and Testament. The stock was not the property of the Executor to

dispose of, he was merely the dispenser of the goods of the dead. The testator, by his Last Will and Testament in writing, gave the stock to his children and grandchildren in the proportion set forth in the Will.

It is respectfully submitted that the case of Conner vs. McSween, 164 S. C., 348, is applicable to the present case. In both events the gift was the gift to a minor. The delivery, in one event, was during the lifetime of the donor, and in the present case the delivery was after his death.

The attention of the Court is called to the case of Smith against Byers, 102 S. C., 218, wherein the Court states that the administrator (executor) is the personal representative of the deceased. What then does this term import if not that he is the same as the testator for the purposes of carrying out his wishes as expressed in his Will, or administering his property if he died intestate. The Court, in this case (Smith vs. Byers, 102 S. C., 218) lays down the rule that the personal representative of the deceased, is in fact the testator, for the purposes of administering the estate. That being the law of this State, the act of the executor was the act of the testator and it is respectfully submitted that the Estate should have been held liable for the stock assessment, for it was the gift of Moses Green to his infant grandchildren, the delivery thereof postponed until after his death.

If infants have no legal capacity to contract for liability upon bank stock, and if, under the authorities cited in the opinion, the Court will avoid the contract if it results to their detriment, then upon whom does the liability rest? The Court says, referring to Conner vs. McSween, 164 S. C., 348, that the transferor would be liable if living. Then it is respectfuly submitted that under the Federal Statute, fixing the liability for stockholders in National Banks, and the decisions thereunder, that the estate of Moses Green is liable to the same extent for a transfer made by the executor, under the Will, as though the testator would have been himself, had he made the transfer while he was living.

"Liability of estate in the hands of executors is not limited to such demands as were existing claims at the time of the death of the testator, but "if the liability was created after his death, and while the shares of stock formed part of his estate, then under the provisions of this section the estate becomes responsible for such liabilities." Wickham v. Hull (C. C. Iowa, 1894), 60 F. 326.

It may be argued that the shares of stock did not form a part of the estate at the time of the levy. This is true so far as the adults who took under the Will are concerned, because they were *sui juris,* but so far as the infants were concerned, the contract has been avoided, the liability must rest somewhere under the statute. It cannot be like Mohammed's coffin, suspended "in midair"; someone is liable and yet the language of the opinion is as follows, "no liability for this contingent indebtedness can be placed upon any one or more of the defendants." How then is the provisions of the statute to be enforced, if neither the estate of the testator nor any of the defendants are liable therefor. It is true that in a great many instances the liability cannot be collected, but nevertheless a contingent liability exists upon every share of stock issued by a National Bank. It is respectfully submitted that this decision nullifies the provisions of the Federal Statute.

The Court bases its opinion upon the case of Williams vs. Cobb, 242 U. S., 307. The facts in that case were that a devisee or legatee was attempted to be held for stock which was transferred from the estate from which he inherited and the Court held in that case that the transfer to the Trustees, under the Wisconsin Statute, was a valid transfer and the Trustees were legally capable of holding stock as such and therefore the devisee or legatee, who was sued was not liable to the extent of the property held by him as such. In the present investigation the minors did not have the legal capacity to assume the liability and therefore the case of Williams vs. Cobb is not applicable to the facts in this case.

V.

The Court uses this language "it might also be given as the reason for non liability of the estate, that during the administration of the estate by the executor, *no claim* on the part of the *depositors* * * * existed in their favor against the estate of Moses Green." Under the Federal Statute, upon which this suit was brought, the benefit is for the benefit of the *creditors* and not the depositors and the Federal Statute was plead in the complaint by the plaintiff in this cause (see paragraph 11, FF 13). It therefore is respectfully submitted that the only law applicable to this case would be the Federal Statute and the decisions thereunder.

The decision as written nullifies the Federal Statute fixing liability for bank stock. The decision in brief holds neither the Estate of Moses Green, nor any of his devisees of legatees to the extent of the property held by them as such is liable, which in effect holds that no one is liable on the four shares of stock. Carrying this conclusion to the nth degree, if Moses Green had owned ninety-nine per cent of the stock, and his Will had fixed the rights of his children and grandchildren as it did in this case, then the *creditors* of the Bank would not be able to obtain a judgment on ninety-nine per cent of the stock outstanding, although the statute gives that right.

I, the undersigned attorney for the petitioner, do hereby certify that there is no specific property involved in this case and for that reason it is not necessary for the appellants and defendants who have not appealed to personally sign this consent in writing for the status of the property involved in the case to remain undisturbed.

RAYMON SCHWARTZ,
Petitioner for Respondent.
(Respondent in State Supreme Court being Bank Receiver.)

I certify that in my opinion there is merit in the grounds stated in the foregoing petition for a rehearing, and that I am not in any way concerned or connected with the case.

My opinion is that the Court has overlooked material matters of law, in reaching its conclusion. That this conclusion, on my part, is reached after having taken up the record on appeal, the briefs of the defendants who did not appeal and the brief of the appellants and of the respondent. I have carefully studied the opinion of the Court, and in all matters relating to the case have viewed it just as though I was sitting as a member of the Court.

The complaint sets out the facts relating to the assessment and alleges that the property, in the hands of the adult defendants, is liable to such assessment. The Answer of these adult defendants practically does not controvert any allegations to the complaint. There is no allegation of the complaint alleging that they are personally liable, and hence their denial of this raises no issues and the denial as to the estate of Moses Green simply states a conclusion. It may be that ordinarily, where the foundation of the suit falls, the liability of all persons connected with it would fall, such as the case of granting an injunction, where the complaint is dismissed the injunction goes with it. But in this case it is sought to hold the property of the estate of Moses Green in the hands of these adult defendants liable, and they admit that such property is liable—it is so alleged in the complaint and not denied. The judgment of the Circuit ordered such property to be subjected to the payment of the assessment and they did not appeal. It is respectfully submitted that it would be a far-reaching precedent to relieve parties to a suit from a judgment from which they did not appeal, and therefore confessedly by such act say they are liable to perform. In making this certificate, I am fully aware of the rule of Court as to the courses that should be pursued by an attorney before making a certificate, and hence before making it endeavored to comply in all respects to the rule of this Court in respect to the relation thereto and have most carefully studied the entire record.

Signed R. O. Purdy.